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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JEREMY HELLER, Defendant and Appellant.	2d Crim. No. B295817 (Super. Ct. No. 2017018604) (Ventura County)

Jeremy Heller appeals a judgment following his conviction for second degree robbery. (Pen. Code, § 211.)[1] The trial court found he fell within the purview of the three strikes law and sentenced him to an aggregate state prison term of 12 years. We conclude, among other things, that: 1) the trial court did not abuse its discretion by admitting evidence of a prior uncharged crime; 2) the court properly admitted evidence of Heller's phone conversations as adoptive admissions; 3) the sentence must be vacated and the case remanded for resentencing because the

[1] All statutory references are to the Penal Code.

court erred in calculating Heller's sentence for robbery; 4) the court imposed a mandatory five-year consecutive sentencing enhancement under section 667, but Senate Bill No. 1393 now authorizes the court to retroactively determine in its discretion whether such an enhancement should be imposed; 5) Senate Bill No. 136 amends the section 667.5, subdivision (b) consecutive one-year enhancement the court imposed and permits the court to provide retroactive resentencing relief; and 6) the court issued invalid no contact orders.

The sentence is vacated and the matter is remanded for resentencing. The no contact orders are stricken. In all other respects, we affirm.

FACTS

Around 7:30 p.m., on May 13, 2017, James Powell was sitting in the driver's seat of his car. His girlfriend was in the passenger seat. Powell had parked his Mercedes near a park and they were waiting for a friend. He leaned over to give his girlfriend a kiss. Heller suddenly approached and opened the driver's side door of Powell's car.

Heller told Powell "sit back" and "give me everything that you have." Heller's right hand was "underneath his jacket." He was holding a "stock" or the "back of a knife or something like that was visible." Heller grabbed Powell's phone, key, glasses, and wallet. He then walked back toward a red Toyota automobile that had just "rolled right up." He jumped into the passenger side of the Toyota.

Powell got out of his car and jumped in front of the Toyota to try to see the license plate number. The woman driving the Toyota briefly stopped. Powell was able to see the last three letters of that license plate to make a report to the police.

Powell's girlfriend called 911. She told the police that Heller "had a gun or something in his pocket." She said the woman who drove the Toyota had red hair. A friend of Powell's was nearby and was able "to catch the first three license plate numbers" of the Toyota.

The morning after the robbery Police Officer Adrian Barrera spotted the red Toyota in a parking lot. He conducted a "stakeout." Around noontime, he saw the Toyota "pull out of that parking lot." He stopped the vehicle and took the two occupants of that Toyota into custody. Renee Gutierrez, Heller's girlfriend, was the driver, and Heller was the passenger. Barrera searched the Toyota and found several items Heller had taken during the robbery, including Powell's glasses, phone, and his "OtterBox" case.

While in jail, Heller made two phone calls to his girlfriend Gutierrez. The People sought to introduce the tapes and transcripts of those calls into evidence. The trial court overruled a defense objection. It ruled that evidence was admissible because it contained adoptive admissions by Heller.

The People noted that Heller had a prior conviction for felony grand theft "based on his conduct toward Akbar Alikhan on August 13, 2003." It sought to introduce that evidence at trial. The defense objected claiming it was not relevant to Heller's current charged offense of second degree robbery, it would not show a "common plan or scheme," and Heller could not be convicted based on prior acts. The trial court overruled the objections and ruled the evidence about that prior conviction could be introduced.

At trial, Alikhan testified about that prior conviction. He said he drove his car to a McDonald's drive-thru around 7:00 p.m.

He had a passenger in his car. Two people approached his car. Heller approached the driver's side of the vehicle and reached for his "waistband to display a weapon." Alikhan rolled down the window. He interpreted Heller's gesture to the waistband to mean "[d]o you have money on you?" Alikhan saw "a handle." He did not know if it was a knife or gun. He testified, "[T]here was nothing in my wallet. They proceeded to take it." Heller examined the wallet and returned it. Alikhan saw that an AAA card and a Blockbuster card were missing. He and his passenger found $25 and they gave it to Heller.

DISCUSSION

Admission Evidence About a Prior Crime Committed in 2003

Heller contends the trial court erred by admitting evidence of the prior 2003 crime – his prior grand theft conviction involving the victim Alikhan. He claims this evidence was unduly prejudicial requiring reversal of his robbery conviction. We disagree.

The trial court found evidence about Heller's 2003 theft conviction showed, among other things, a "common plan or scheme" and was admissible in evidence.

" 'Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes.' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.) "Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and

uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*Ibid*.)

" 'To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses.' " (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148.) They must share highly "distinctive" characteristics. (*Ibid*.) But they "need not be mirror images of each other." (*Ibid*.) The existence of some distinctions between the crimes does not necessarily require exclusion of the other crimes evidence to prove identity. (*Ibid*.) Where the crimes do not share highly distinctive features to prove identity, they may nonetheless be relevant on the issues of intent and common plan. (*Ibid*.) "A greater degree of similarity is required in order to prove the existence of a common design or plan." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

" 'The probative value of the uncharged evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice . . . .' " (*People v. Carter*, *supra*, 36 Cal.4th at p. 1149.) We review the trial court's decision on this issue for "abuse of discretion." (*Id*. at p. 1147.)

Heller contends the trial court "erred in admitting evidence related to [his] 2003 conviction because the facts of the previous crime were dissimilar to the facts in the instant case."

But the charged and uncharged offenses shared several common factors supporting a reasonable inference that Heller had a particular method of committing his crimes: 1) each crime was committed around the same time of night, 7:00 to 7:30 p.m.; 2) the cars targeted contained two victims, a driver and a passenger, supporting a reasonable inference that Heller could anticipate that they might be talking, otherwise distracted, and

unprepared for his approach; 3) Heller suddenly approached from the driver's side of the car to prevent the driver from driving away; 4) he did not draw a weapon before he reached the car, which might draw the attention of third parties or bystanders; 5) his weapon was partially concealed in a waistband or pocket; 6) the cars he targeted were particularly vulnerable, they were stopped and not in street driving lanes – one was stopped at a drive-thru area of a restaurant, the other was parked near a park and the driver was waiting for a friend; 7) as the People note, Heller "displayed a signature manner of theft – he flashed the handle of a concealed weapon in his waist, intimidating both victims into quick and quiet compliance"; 8) Heller had an accomplice; and 9) in each crime he took a wallet and walked away. The trial court could reasonably find this was highly probative evidence. Heller has not shown an abuse of discretion. But even had he shown that the trial court erred, the error would be harmless. The People presented strong evidence of Heller's guilt on the charged offense. Powell and his friend obtained the license plate information from the red Toyota involved in the robbery. Items taken during the robbery were in the red Toyota the police stopped the morning after the robbery. Heller and Gutierrez were in that car at the time they were arrested.

Admission of Evidence Regarding Heller's Telephone Calls

Heller contends that statements in the two jail calls between himself and his girlfriend were improperly admitted as adoptive admissions. We disagree.

The trial court found statements were admissible as "adoptive" admissions between Heller and his girlfriend made in phone calls when Heller was in jail, which were documented by transcripts.

" 'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' " (*People v. Armstrong* (2019) 6 Cal.5th 735, 789.) " ' " 'Under this provision, '[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment . . . , and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' " ' " (*Id.* at pp. 789-790.)

A defendant's " 'silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.) Admissibility is warranted if a defendant's response to an accusatory statement " 'was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.' " (*Id.* at pp. 1189-1190.)

In the first phone call Heller made to his girlfriend Gutierrez, she told him, among other things, that a detective asked her if she "took part in the robbery" and "if [they] were at the park." Heller responded, "You don't remember the detective's name or nothing?" Heller asked whether the person was a detective or an investigator. She responded, "I don't know, that fool just was like so positive that even you're gonna do time and all this shit. Like he was being a dick." Heller: "You should

have been like I don't give a fuck, hah. I'm gonna call a lawyer. Fuck you." Later in the conversation, Gutierrez said, "I just told him like – he asked if we were there that day. He asked if we were at the park. I said we were at a park. He was trying to get a specific park, but I told him I didn't know. I don't know." Heller: "Why didn't you just (unintelligible)." Gutierrez: "I know, I know. I got --" Heller: "*We were never even at a park*." (Italics added.)

In a second call Heller made to Gutierrez, she asked, "[W]hat do I do . . . ?" Heller: "Well, you put yourself on (unintelligible) *the whole time I was trying to keep you out of this. All you had to do was not say anything*." (Italics added.) He also told her, "Look, the whole time they didn't have shit. Okay. Listen carefully. They don't have . . . nothing on you. They have a vague description of somebody who was suppos[edly] with the person who committed a crime. *All they had was the car, right*[?]" (Italics added.) He said, "Don't worry about me. *I'm probably gonna do time regardless* . . . . I'm already over here figuring how much time I'm gonna do. [I'm] not even gonna be gone that long and you're over here fuck – I'm over here just trying to keep you away from all this shit. Babe." (Italics added.)

Heller contends his statement in the first conversation that "[w]e were never even at a park" is a denial to the accusation that he committed robbery, not an adoptive admission. But, as the People note, the reasonable inference from the content of the conversation shows "[Heller] brushed past an opportunity to deny his involvement in the robbery and instructed [his girlfriend] on how to better mislead police" by suggesting she say "[w]e were never at a park."

Heller claims many of his girlfriend's statements in the first call involved a "jumbled set of statements regarding questions posed to [her] by a police officer," and not an accusatory statement involving him. But one of the questions the detective asked his girlfriend was "if we were at the park," the place where the robbery occurred, and the "we" in that question included Heller. Moreover, when she mentioned the robbery, Heller did not deny it. He simply wanted to know the name of the detective.

Heller contends the statements his girlfriend made in the second call were too vague or unrelated to the robbery to constitute an accusatory statement. But, as the People note, this conversation included Heller's incriminating and gratuitous references to: 1) the crime, 2) the car, 3) information the police had, 4) his belief that his girlfriend had disclosed too much information to the police, and 5) his incriminating statements about the punishment he expected to receive. This conversation contained sufficient evidence for the jury to draw reasonable inferences that Heller had made adoptive admissions. (*People v. Riel*, *supra*, 22 Cal.4th at pp. 1189-1190.)

But even had Heller shown error, the result would not change. As already mentioned, the error would be harmless given the strong evidence of guilt the People presented.

Sentencing

The parties correctly note that the trial court imposed an unauthorized sentence and the case must be remanded for resentencing.

Heller was convicted of second degree robbery. He admitted he had a prior felony strike offense for robbery. The trial court struck "the prior robbery strike for purposes of sentencing." It then ruled it was selecting the midterm for the

second degree robbery offense (three years). It then doubled that for a six-year sentence. It added a five-year consecutive sentence enhancement under section 667 and a consecutive one-year enhancement under section 667.5, subdivision (b) to achieve an aggregate sentence of 12 years.

But "[r]obbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years." (§ 213, subd. (a)(2).) The trial court selected the midterm of three years. But it erred in doubling that term under the three strikes law to reach a six-year sentence because it had stricken the prior strike which was the basis for the doubled sentence. The case must be remanded for resentencing.

The trial court imposed a mandatory five-year consecutive enhancement under section 667. But Senate Bill No. 1393 now authorizes the court to retroactively determine in its discretion whether such an enhancement should be imposed. Senate Bill No. 136 amends the section 667.5, subdivision (b) consecutive one-year enhancement the court imposed and permits the court to provide retroactive relief to strike that enhancement under the new enhancement law.

The No Contact Orders

After sentencing Heller to prison, the trial court ordered him to have no contact with the robbery victims. The parties agree that these no contact orders were not valid and should be stricken.

The trial court has power to issue no contact orders under section 136.2. But these orders are " 'operative only during the pendency of criminal proceedings and as prejudgment orders.' " (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1325.)

The Imposition of Fines, Fees, and Costs

Heller contends that under *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168, 1172, the trial court contravened his right to due process by imposing fines and fees without first holding a hearing to determine his ability to pay. Although *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155, holds that failure to raise this issue in the trial court constitutes a forfeiture, we see no reason, as the People suggest, not to raise the issue of his ability to pay certain fines and fees when the matter is remanded for resentencing.

DISPOSITION

The sentence is vacated and the case is remanded to the trial court for resentencing. The no contact orders are stricken. Heller may raise the issues concerning fines and fees under *People v. Dueñas*, *supra*, 30 Cal.App.5th 1157. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Michele M. Castillo, Judge

Superior Court County of Ventura

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